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# MICHIGAN LAW REVIEW

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## THE ENGLISH LAW COURTS AT THE CLOSE OF THE REVOLUTION OF 1688.

**I**N view of the part which the judges played for and against the first two STUARTS,<sup>1</sup> and in view of the grievances of the subject under the law as administered in the ordinary courts<sup>2</sup>—to say nothing of the Star Chamber and the High Commission—it was to be expected that, in the great political and religious upheaval resulting from the Puritan Revolution and the ensuing Civil War, the legal edifice could not remain unshaken. As is well known, one of the early acts of the Long Parliament, in the summer of 1641, was to abolish the Star Chamber, the Court of High Commission, the Council of the North, and greatly to curtail the jurisdiction of the Council of Wales and the Marches.<sup>3</sup> However, this was only the beginning. The Nominated, Little or Barebones Parliament in its brief but ambitious session from July to December, 1653, had a far-reaching scheme of legal reform, proposing, indeed, to reduce the laws of England to a code that should be of “no greater bigness

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<sup>1</sup> v. S. R. Gardiner, *History of England, 1603-1642*, (10 vols. London, 1893-1895), esp. II, 35-42; 271-282; III, 1-27; VIII, 94-96; 205-208; 271-280.

<sup>2</sup> These grievances are graphically set forth in a long series of petitions to the House of Lords. Historical Manuscripts Commission, Reports III, 3-36; IV, 2-124; V, 3-120; VI, 1-219; VII, 1-182; VIII, 101-174; IX, pt. ii, 1-125; XI, pt. ii, 1-326; XII, pt. vi, 1-461.

<sup>3</sup> 17 Car. I. chaps. 10. 11. The most important sections of these acts are reprinted in S. R. Gardiner, *Constitutional Documents of the Puritan Revolution*, (2nd ed., Oxford, 1899), pp. 179-189. In his *History of England*, I, 404, Gardiner states that the Council of Wales and the Marches was also abolished. As a matter of fact, only its extraordinary powers were taken away and its civil jurisdiction continued until the Council was finally abolished, 25 July 1689, 1 Wm. & M., c. 27, v. Caroline A. J. Skeel, *The Council in the Marches of Wales*, (London, 1904) 158 ff., 179; *Lords Journals*, XIV, 231, and *Hist. Mss. Com. Rept. VII*, pt. vi, 105-109, where the abuses of the court are rehearsed in vivid detail. An annexed petition, signed by 18,000 inhabitants of Wales represents that: “The Court \* \* \* is a great expense to the Crown and no advantage to it, and is oppressive to petitioners, and different from all Courts in England. It is useless also as the Court of Great Sessions answers all its ends.” On 23 November a complaint was framed against the latter Court for the

than a pocket-book."<sup>4</sup> Unhappily the reach of this zealous Parliament exceeded its grasp, and, in the rush of events following its premature demise, little or no attention was paid henceforth, to legal matters during troubled years of the Commonwealth and Protectorate.

Although the restoration of the Monarchy and the Established Church was brought about in 1660, the Puritan Revolution had achieved results which endured. The new Monarchy was never again to be a Monarchy completely independent of Parliament, and the re-established Church was never again to be a National Church embracing every English subject as such. A sturdy body of dissenters had sprung up and multiplied during the conflict, and the seventeenth century had not run its course before many of them had obtained a recognized legal status outside the bounds of the Establishment. From the standpoint of law reform the Restoration era is intensely significant.

Military tenures were swept away or turned into free and common socage, the Court of Wards was abolished, and purveyance and preemption ceased to be legal in 1660.<sup>5</sup> In 1670 the practice of fining juries came to an end;<sup>6</sup> in 1677 the barbarous career of the writ *de haeretica comburendo* was brought to a close; and the licensing act which muzzled the press by a rigid censorship went into abeyance from 1679 to 1685 and was never renewed after 1693. In 1679 "An Act for the better securing of the Liberty of the Subject, and for the prevention of Imprisonment beyond the Seas,"<sup>7</sup> popularly known as the HABEAS CORPUS ACT, made the famous writ more than ever before a reality. Also Parliament by frequent and

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unreasonableness and extravagance of its fees. In particular the complaint mentions "the great vexation upon the levying of fines and recoveries, for a man may pass and compound for an estate of 1,000l. a year at an easier rate in the Common Pleas than that of 200l. in Wales." Ibid 328.

<sup>4</sup> The proposed legal reforms of this Parliament—entrusted to two committees, one parliamentary headed by Oliver Cromwell and one non-parliamentary headed by Sir Matthew Hale—may be found in Somers Tracts, VI, 177-245. Sir James Fitz-James Stephen in his History of the Criminal Law (3 vols., London, 1883) points out that these proposals have "never been noticed as they deserve" and gives an abstract of those relating to the criminal law, "many of which have since been carried into effect and made a part of the present system."

<sup>5</sup> 12 Car. II, c. 24. Purveyance, however, was in a measure revived by "An Act for providing necessary carriages for his Majesty and in his royal progresses and removals (13 Car. II, c. 8). So late as 1782 Edmund Burke in his celebrated Speech on Economical Reform has a graphic picture of the King's purveyor "sallying forth from under a Gothic portcullis to purchase provision with power and prerogative instead of money, and to bring home the plunder of a hundred markets, and all that could be seized from a flying and hiding country." v. Andrew Amos, The English Constitution in the Reign of King Charles II. (London, 1857) p. 223.

<sup>6</sup> By the celebrated Bushell's Case, State Trials, VI, 967, ff., 999-1260.

<sup>7</sup> 31 Car. II, c. 8.

effective impeachments sought to hold ministers of the crown in some measure responsible to itself, while the original and appellate jurisdiction of the House of Lords was virtually settled in 1666 and 1675 respectively.<sup>8</sup> Moreover, in the domain of private law progressive steps were taken. The statutes of Amendments and Jeofails<sup>9</sup> and the statute for Distribution of Intestates<sup>10</sup> Estates, according to BLACKSTONE, "cut off those superfluous niceties which so long had disgraced our courts." More notable was the famous STATUTE OF FRAUDS,<sup>11</sup> which, among other things, required feoffments, creations or assignments of trust estates, and leases for terms exceeding three years to be in writing<sup>12</sup>—"a great and necessary security to private property," BLACKSTONE assures us.

All this prompted BLACKSTONE to make the famous statement:<sup>13</sup> "That the constitution of England had arrived at its full vigor, and the true balance between liberty and prerogative was happily established by *law* in the reign of CHARLES II. \* \* \* It is far from my intention," he continues, "to palliate or defend many very iniquitous proceedings, *contrary to all law* in that reign. What seems incontestable is this; that, *by the law*, as it then stood (notwithstanding some individious, nay dangerous branches of the prerogative have since been lopped off, and the rest more clearly defined), the people had as large a portion of real liberty as is consistent with a state of society, and sufficient power, residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative, for which I need but appeal to the catastrophe of the next reign." In a note he adds: "The point at which I would fix this theoretical perfection of our public law is in the year 1679;<sup>14</sup> after the HABEAS

<sup>8</sup> Skinner v. East India Co. State Trials, VI, 710-770; Hargreaves's preface to Sir Matthew Hale's Jurisdiction of the House of Lords; L. O. Pike, Constitutional History of the House of Lords, (London, 1894), 272-307. Shirley v. Fagg, State Trials, VI, 1122-1189; Pike, House of Lords, 279-307.

<sup>9</sup> 16 & 17 Car. II, c. 8, styled, 1 Ventris, 100, "an omnipotent act," providing that writs of error cannot be maintained, except for material error assigned.

<sup>10</sup> 22 & 23 Car. II, c. 10, explained 29 Car. II, c. 3, sec. 24.

<sup>11</sup> 29 Car. II, c. 3.

<sup>12</sup> Roger North in that gem among fraternal eulogies, his Life of the Rt. Hon. Francis North, Baron Guilford (Jessup ed. London, 1890), which, in spite of its manifest bias, throws a flood of light on the political and legal conditions of the period, and expresses with inimitable tartness much sound sense, quotes Lord Northampton as saying that "every line [of the Statute of Frauds] was worth a subsidy." 141. In claiming for his brother "a great hand in the statute" and in "regulating much else that was amiss in the law" he has this admirable observation: "For it is impossible but in the process of time as well as from the nature of things changing \* \* \* abuses will grow up; for which reason the law must be kept as a garden with frequent digging, weeding, turning, &c. That which in one age was convenient and, perhaps, necessary, in another becomes intolerable nuisance." 140.

<sup>13</sup> 4 Commentaries, 439.

<sup>14</sup> Compare with this rosy optimism "An Address to the Friends of Free Inquiry and the Public Good" published at Derby, 16 July 1792, and printed in the London

CORPUS ACT was passed, and that for licensing the press had expired, though the years which immediately followed were times of great *practical* oppression." A few years later CHARLES JAMES FOX, with BLACKSTONE's text before him, was moved to write in the introduction to his torso on the HISTORY OF THE REIGN OF JAMES II: "The reign of CHARLES II forms one of the most singular, as well as the most important periods of history. It is the era of good laws and bad government," followed by a time of "oppression and misery," due to "a wicked and corrupt administration, which all the so-much-admired checks of the constitution were not able to prevent." Lord JOHN RUSSELL, in 1821, voiced the same idea, in his HISTORY OF THE ENGLISH GOVERNMENT AND CONSTITUTION, declaring that in the reign of CHARLES II were to be found "the worst of governments and the best of laws."<sup>15</sup>

In 1857 ANDREW AMOS, at that time Downing Professor of Law in the University of Cambridge—notable as the chair recently held by England's most brilliant legal scholar, the late FREDERICK WILLIAM MAITLAND,—published his ENGLISH CONSTITUTION IN THE REIGN OF CHARLES II, with the aim of considering "how far the 'practical oppressions' and the 'many iniquitous proceedings contrary to all law' which BLACKSTONE admits to have disgraced the reign of CHARLES II, and which FOX contrasts with the alleged theoretical perfection of the Constitution in that reign, were, in any way, consequences of the Constitution being deficient in the perfection attributed to it." His conclusion is that "grievous oppression was often inflicted without any infraction of statute law, still less of the common law of the reign; that the wickedness of men in high places, was, in great measure, engendered and encouraged by badness of law; and the King, the Ministers of State, Judges<sup>16</sup> and

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Morning Chronicle, 25 December following. It states that "deep and alarming abuses exist in the British Government," among other things: "a criminal code of laws sanguine and ineffacious, a civil code so voluminous and mysterious as to puzzle the best understandings." Cited from Stephen, Criminal Law II, 366.

<sup>15</sup> Both these extracts, as well as the famous quotation from Blackstone, are cited by Amos, English Constitution, 1-4.

<sup>16</sup> However, the fact must not be obscured that the character of the judges and the way they interpreted and administered the laws is quite as important as the laws themselves. As Amos himself notes, in another connection: "The Constitution recognizes an unwritten as much as a written law, and does not furnish any severer test of what is unwritten law than the opinions of those *Leges loquentes*, the Judges" (p. 246). There are vivid though prejudiced sketches of the judges of the Restoration period in North's Guilford, of Hale, 79 ff.; of Bridgeman, 114-115; of Scroggs, 196-197; of Fitton, 269; of Jeffreys, 273 ff., especially 288; of Pemberton, 291 ff.; of Saunders, 293 ff. The following exquisite bit is a sample of North's characterization: "Lord Nottingham \* \* \* came in and sat there [as Lord Chancellor, 1674-1682] a great many years. During his time the business, I cannot say the justice, of the court flourished exceedingly. For he was a formalist and took pleasure in hearing and deciding; and gave way to all kinds of motions the counsel would offer; supposing

Juries, however viciously inclined, could not have accomplished the mischiefs they perpetrated, but through the imperfections of the Constitution."<sup>17</sup> Regarding the generality of the laws then in force he asserts that "the legislatures which have repealed or modified them, have not, during the space of two hundred years, been pursuing an altogether downward course, nor been employed in gilding refined gold, painting lilies and perfuming violets." He continues: "Whether we turn our attention to the civil or criminal laws, those of foreign or domestic commerce, of landed or personal property, we shall probably agree with one of the brightest ornaments of the reign of CHARLES II, Sir MATTHEW HALE, that, however wise may have been our legislators, two hundred years ago, 'Time is the wisest thing under heaven.'"<sup>18</sup>

AMOS treats the constitutional law in force in the reign of CHARLES II under the following heads: (1) The Sovereign. (2) The Parliament. (3) The Established Church. (4) Liberty of Conscience. (5) Liberty of the Person. (6) Liberty of Property. (7) Liberty of the Press. (8) Procedure in Prosecutions for State Offenses. The faults of procedure he again divides under six sub-heads: (1) The defective system of trial by peers. (2) The appointment of judges, *durante bene placito*.<sup>19</sup> (3) Packing of Juries. (4) Restrictions on counsel and attorneys for the defense. (5) Perjured witnesses. (6) Defective and unjust rules of practice. As to procedure, AMOS with a thesis to prove disregards or overlooks much that may be said on the other side.<sup>20</sup> One consideration, indeed, may never have occurred to him—that which explains, if it does not wholly excuse, the manifest injustice in the state trials, particularly of those convicted for alleged participation in the Popish

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that if he split the hair and with his gold scales determined reasonably on one side of the motion, justice was nicely done" 259. Lord Campbell's *Lives of the Lord Chancellors (1845-7)* and *Lives of the Chief Justices (1849)* are readable but carelessly prepared and untrustworthy. See *Dictionary of National Biography*, VIII, 383. In this monumental work and in Edward Foss's *Judges of England* (9 vols., London, 1848-1864), may be found sound and impartial accounts of the judges of the period. Henry B. Irving's *The Life of Judge Jeffreys* (London, 1898) is an apologia, and a briefer one may be found in Francis Watt, *Terrors of the Law*, (New York, 1902), pp. 17-39. A manifest defect in the law which accentuated the subserviency of the judges was the fact that all of them except the barons of the Exchequer held office *durante bene placito* till 12 & 13 Wm. III, c. 3.

<sup>17</sup> Eng. Const., 9, 10.

<sup>18</sup> *Ibid.*, 6.

<sup>19</sup> See above, p. 532, note 16. Andrew Marvell exclaimed, apropos of this abuse: "What French counsel, what standing armies, what parliamentary bribes, what national oaths, and all other machinations of wicked men had not been able to effect, was more compendiously acted by twelve men in scarlet," cited by Amos, 261. In North's *Guilford*, 290-291, there is an unblushing and quaintly worded defense of politically appointed judges on the ground of state necessity.

<sup>20</sup> For a more judicial view see Stephen, *Criminal Law*, I, 369-416.

and Rye House plots. It is true that the judges were brutal and biased prosecutors, and that the witnesses were allowed to tell, with more or less impunity, what they knew to be lies; yet it must be borne in mind that the Government which the judges represented was in constant fear of attack from abroad, of treason and rebellion at home, that it lacked the security of an adequate police or military force, and, hence, saw no safety except in swift, ruthless convictions. Thus the law courts were concerned, not so much with saving the innocent, as in acting as "citadels against treason," in making examples of those who seemed guilty—who were publicly accused of threatening the safety of the State.<sup>21</sup> Nevertheless, although AMOS over darkens the excessively bright picture of the English Constitution in the Restoration period as painted by BLACKSTONE, he has furnished a really helpful antidote to the legion of too credulous readers of "the great Commentator who first drew down English Law from the clouds."

Confining himself to public constitutional law, AMOS leaves out of account such improvements in the private law as may be found in the Statutes of Frauds, Distributions and Jeofails.<sup>22</sup> Nor is it the purpose of the present writer to discuss these enactments which are amply treated in numerous general and special works on English law. The remainder of this paper will be devoted to a grave abuse which AMOS failed to consider in his critical counterblast to BLACKSTONE's fervid laudation of the English constitution—the excessive number of superfluous offices attached to the Common Law courts and to Chancery. The three chief objections to this state of affairs are obvious. It complicated and retarded the administration of justice; the cumulative fees—though as a rule, no single one was very large—made suits exceedingly costly for litigants;<sup>23</sup> and the patronage at the disposal of the Government offered an extensive and dangerous opportunity for corruption.<sup>24</sup>

<sup>21</sup> This is brought out by Stephen, v. n. 20; Pike, *History of Crime in England* (2 vols. London, 1873-1876) II, 204ff; and by John Pollock, *Popish Plot* (London, 1903) 265ff.

<sup>22</sup> "Further," he writes, "it is not intended in the present inquiry, to follow Sir William Blackstone in a review of laws not contributing to the vigour of the Constitution, with whatever other vigour they may be endowed. The Statutes of Frauds, Distributions and Jeofails \* \* \* which he adduces may appear irrelevant to the perfection of the Constitution, to which point they are applied by him." Amos, *English Constitution*, 5.

<sup>23</sup> The committees appointed by the Barebones Parliament suggested among other reforms a regulated scale of court fees. They may be found in tabulated form, *Somers Tracts*, VI, 202; 233-234; 239-240.

<sup>24</sup> Roger North, in describing (p. 265) his brother's cautious attempts to curtail this abuse, reflects the contemporary justification, "and in all his designs he showed no disposition to retrench officers or the just profits of their places, but only that he would have them held strictly to their duty and not have it in their power to aid

There are many incidental allusions to the fees which were collected by the judges and court officials in this period.<sup>25</sup> For example, FRANCIS NORTH made £7000 a year in fees as Attorney General and £4000 as Chief Justice of the Common Pleas, which, considering the greater purchasing power of money in those days, means a huge income in either case.<sup>26</sup> One curious abuse is set forth in HOWELL'S COLLECTIONS, namely, that the judges sold the licenses to print the State Trials. SCROGGS, for instance, sold the exclusive right of publishing certain specified trials of priests involved in the Popish Plot, and, having taken 20 guineas, in earnest, he sold the rights to another party and refused to return the earnest money. Also, he sold the exclusive right of publishing Sir GEORGE WAKEMAN'S trial for 150 guineas, while, in case the trial lasted more than one day, he was to receive an additional 100 guineas.<sup>27</sup> Besides such questionable perquisites enjoyed by the judges, another evil arose from the fact that they were enabled to edit the trials and thus, not only to insert *ex post facto* wit and learning, but to delete any proceedings or observations which they did not care to have on record. We learn from a case which FRANCIS NORTH conducted for his grandfather that solicitors' fees were claimed for "a bale of papers, \* \* \* for the answer and depositions, besides many breviates, orders, &c. \* \* \* whereof no entry at all was in the offices (no miracle in our days)."<sup>28</sup> Another notorious abuse is thus recorded by this breezy and well-informed biographer: "I have heard Sir JOHN CHURCHILL, a famous chancery practicer, say, that in his walk from Lincoln's Inn down to the Temple-hall, where, in the Lord Keeper BRIDGEMAN'S time, causes and motions out of term were heard, he had taken £28 with breviates, only for motions and defenses for hastening and retarding hearings." The Common Law, he continues, was much superior "for the preciseness of its

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abuses for their peculiar profit, and to be subject to correction when they are negligent or ignorant; and to make amends to the suitors who suffer thereby. Now most think that the offices themselves are the abuse and ought to be retrenched. \* \* \* But I guess his lordship considered that there was a justice due as well to the crown, which had advantages growing by the disposition of places, profits by process of all sorts; as also the judges and their servants and counsel at the bar and solicitors, who were all in possessions of their advantages, and by public encouragement to spend their youth to make them fit for them and had no other means, generally, to provide for themselves and their families: and had a right to their reasonable profits, if not strictly by law, yet through long connivance."

<sup>25</sup> For the fees of sheriffs and other local officials, see "A charge of Serjeant Thorpe, Judge of the Northern Circuit, as it was delivered to the Grand Jury at the York Assizes, 20 March, 1648." Harleian Miscellany, II, 10ff.

<sup>26</sup> North's Guilford, 119, 125.

<sup>27</sup> Amos, English Constitution, 247, 248.

<sup>28</sup> North's Guilford, 32.



rules. There men knew their times to plead, to give notices, to enter judgments, &c."<sup>29</sup>

NORTH goes on to state that, when his brother ascended from the chief justiceship of the Common Pleas to the woolsack, "he found very great mischiefs by errors in Masters' reports, which, shown to him, had been set right: but the parties craftily let the report go and depended to bring it back by exceptions, and so torment the court with abundance of frivolous matters for experiment, and came off at last with such a slip as carries the cost and is an immane vexation to the parties."<sup>30</sup> Then "causes often came to a hearing with a file of orders in the solicitors' bundle as big as the common prayer book, for commissions, injunctions, publications, speedings, delayings and interlocutories, all dear ware to the client in every respect." Furthermore, there were "wicked delays" in the register's office.<sup>31</sup> According to ROGER NORTH it was worriment over the evils in chancery procedure and the struggle to remedy them that contributed to bring on the distemper which led to his brother's death at the early age of forty-eight.<sup>32</sup>

Lord Keeper GUILFORD, however, was no nicer than the ordinary run of his contemporaries in regard to gathering in perquisites. On one occasion he became involved in a curious predicament in connection with the Six Clerks in the Chancery office. According to his brother, they had "great dependence on the course of the Court of Chancery for their profits," and were "always disposed to keep the judge in good humour and prevent alterations to their prejudice.

<sup>29</sup> *Ibid.*, 260-261.

<sup>30</sup> The curious may find much more information of this sort, *ibid.*, 261-268.

<sup>31</sup> "The register's is a patent office, and the poor men, the deputies, come into their impley upon very hard terms, and the charge of presents and New Years' gifts adds to the weight upon them, so as they are forced to bush about for ways and means to pay their rent and charges and gather an estate, \* \* \* and, accordingly, scarce an order passeth without bribes for expedition in that quarter; and that is an article in the solicitor's bill as much of course as the fee for the order." *Ibid.* 263. The abuses, of course, were almost as great in the Common Law courts. For example, Sir James Stephen suggests that one reason for the long and verbose indictments which continued until comparatively recent times was that "the draughtsmen were paid by the folio." *Criminal Law*, II, 354.

<sup>32</sup> "Nothing sat heavier on his spirits than a great arrear of business when it happened; for he knew well that from thence there sprang up a trade in the register's office, called heraldry, that is, buying and selling precedence in the paper of causes, than which there hath not been a greater abuse in the sight of the sun. If men are not forward, the offices know how to make them come on and pay; for they will expressly postpone the unprofitable customers and so bring them to a sort of redemption. Therefore, if a paper of causes is not well watched by the court and the offices sometimes checked (for which, at best, there will be occasion enough) no man, without a vast expense, shall know surely when his cause will come on. \* \* \* When over night, a man sees his cause first on the paper and, next morning finds it at the bottom, his disappointment is great; and he will be told that, without a touch of purchasable heraldry, he will never be sure of his time." North's Guilford, 267.

And the judges of all the courts make no scruple to accept presents of value from the officers by way of new-year's gift, or otherwise; which is a practice not very commendable because with some, it may have bad effects." In accordance with this unsavoury custom the Six Clerks clubbed together, "and made his lordship a present of £1000, which he took as an instance of their respect, without regard to or knowledge of any other design or intention of theirs." Soon after this they fell out with their sixty under-clerks and sought to remove them as if they had been refractory domestic servants. The sixty who had bought their places and were duly sworn, insisted that they could not be removed without authority of the court. They addressed a petition to the Lord Keeper who confirmed them in their places, much to the disgust of the Six Clerks who had squandered their £1000 for naught.<sup>33</sup> The gifts, nevertheless, continued till the time of Lord COWPER, who abolished them when he became Lord Chancellor in 1707. They had swelled to £1500.<sup>34</sup> When GUILFORD, too ill to carry on his work in London, went to his country house, he was attended by a long retinue of supernumerary officials all travelling at the public expense. "We had a great rout attending," writes brother ROGER, "that belong to the seal, a six-clerk, under clerks, wax-men, &c., who made a good hand of it, being allowed travelling charges out of the hanaper, and yet ate and drank in his lordship's house."<sup>35</sup>

The nearly defunct<sup>36</sup> Forest Courts were another source of oppression in the reign of CHARLES II. ROGER NORTH states in regard to a Court of Justice seat held before the Earl of OXFORD, that justices were appointed to assist the Lord Chief Justice in Eyre, and counsel for the King were declared, who "in all cases in which

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<sup>33</sup> Ibid. 371. The young lawyer and the subordinate legal official had various expenses which were not only burdensome in themselves, but unfortunate in their consequences because those who bore them expected in course of time to reimburse themselves for their outlay out of those who appeared before or were drawn into the courts. Among the heaviest of these expenses were those which had grown up in connection with the "public readings" in the Inns of Court where barristers were trained. The reader was supposed to select a statute to expound and to defend his interpretation against other members of the Society. This intellectual banquet was accompanied by feastings—at the expense of the reader—to which great officers of Church and State were invited. After Francis North, the later Lord Guilford, whose entertainment, lasting three or four days, cost £1,000, apparently no one ventured to read publicly,—the exercise was "turned into a revenue" and a "composition \* \* \* paid into the treasury of the Society." Ibid. 77-78. For a fuller account see William Dugdale, *Origines Juridiciales*, or *Historical Memorials of the English Laws, Courts of Justice, &c.* (London, 1660, 3rd ed. 1680), pp. 203-207, and William Herbert, *Inns of Court and Chancery* (London, 1804) p. 237; Cf. J. M. Zane, *Essays in Anglo-American Legal History*, I, 681ff.

<sup>34</sup> Ibid., citing Burnet's *History of his own Time*, V, 872.

<sup>35</sup> Ibid., 347.

<sup>36</sup> The extant *Placita* extend from 10 John, 1208, 37 Car. II. 1685.

the King's title was not in question, had liberty to advise and plead; so good money, besides a gratuity and riding charges, was picked up. But it is not readily conceived what advantages thence came by gaining an idea of the ancient law in the immediate practice of it. The judges were solemnly received by the counties as on a Circuit, and thus all the forests on this side of Trent were visited." He adds that "the subject matter is unpopular, the officers of the Forest are, on one side, corrupt, and yield to all abuses, and, on the other side, oppress and extort money of all they can, and, as if that were the end of their institution, mind nothing else."<sup>38</sup>

The superfluity of offices attached to the three Common Law Courts and to Chancery at the close of the Restoration period, and indeed for more than a century afterwards, is manifest in an "Inquiry into irregularities of the Courts of Law," begun 7 November, 1689, presumably as one of the fruits of the Revolution of 1688. Most of the papers connected with this inquiry are printed in the manuscripts of the House of Lords for 1689-1690.<sup>39</sup> The immediate occasion of the proceedings was a complaint against the Courts of Law made by the Earl of MACCLESFIELD to the Committee for Privileges.<sup>40</sup> The Lords, 7 November, ordered this committee "to enquire what irregularities are in the Courts of Westminster Hall."<sup>41</sup> The inquiry was subsequently extended to the Court of Chancery, the Courts of Grand Sessions in Wales, and the Courts of the Counties Palatine.<sup>42</sup> A debate on extending the inquiry further to include the Ecclesiastical Courts appears to have come to nothing. The Committee met on 9, 16, 19, 23 November; 3, 7, 10, 17, 19, 21 December; and 8, 11, 15, 17, 21 January, fifteen times in all. The chairman on 9 November and 7 December was the Earl of BRIDGEWATER, at the thirteen other meetings the Earl of OSSULSTON. It was, on the whole, a very active committee; for there was appar-

<sup>38</sup> Cited by Amos. *English Constitution*, 232.

<sup>39</sup> *Hist. Mss. Comm. Rept.*, XII, pt. vi, pp. 313ff.

<sup>40</sup> The general enquiry arose out of a more special one, undertaken in the previous spring by the Committee for Privileges into the encroachments of the Courts of Law upon the privileges of the Peers. During the course of that enquiry, 30 April, 1689, Lord Ossulston informed the Committee that "he had wrong done him by a bill preferred against him in the Exchequer for £20,000 by the Duke of York on Lord Arlington's account to whom he was neither heir, executor, administrator nor assignee. He was frightened into payment of it." *Ibid.* 314n, citing *Priv. Book*, 30 April, 1689.

<sup>41</sup> The original motion in response to Macclesfield's complaint was "to appoint a committee to inspect and regulate the Courts of Justice in Westminster Hall," and, though this motion was altered and the Committee for Privileges carried on the work, the committee is afterward referred to as an ordinary select committee and its proceedings are recorded in the *Committee Book*. *Ibid.* 313, citing *Lords Journals*, XIV, 334.

<sup>42</sup> For the local jurisdictions, particularly Wales, see above, p. 529, note 3, and *Lords Journals*, XIV, 348-352.

ently only one session—16 November—when there were not enough Lords present to form a quorum. At the opening meeting, 9 November, WILLIAM PETYT, keeper of the records in the Tower of London<sup>43</sup> appeared and reported “that by the statute 14 EDWARD III, one Prelate, two Earls and two Barons may be commissioned to regulate abuses in the proceedings in the Courts in Westminster Hall. In 18 EDWARD III there was such a commission granted. In RICHARD II’s time there was such an Act made in Lord LOVELL’s case.”<sup>44</sup> He informs the Committee that the records in the Tower are in great disorder, and that the Calendars to the Records are embezzled so that he cannot give so good an account of them as he ought to do. He has been 30 weeks in office, and has not yet got in that time £30 perquisites. His predecessors had £500 a year salary. He is to have but £200. *Ordered* to report that Mr. PETYT may have the same salary as Mr. PRYNNE had, as well as a present consideration to enable him to keep clerks, to make new Calendars and to make the Office of Records in the Tower more useful. The House in this report agreed to address the King accordingly.”<sup>45</sup>

Also on 9 November the Committee ordered the Judges of the several courts in Westminster Hall to send in a list of the several offices and officers in their respective courts and a table of the ancient fees. Ten days later, Commissioners of the Great Seal were ordered to send in a similar list for the Court of Chancery.<sup>46</sup> As is well known, the three Common Law Courts, from EDWARD I—when their identity was completely established by separate plea rolls—to their reorganization in 1873-75, were the King’s Bench, the Common Pleas and the Exchequer. Primarily the King’s Bench was supposed to deal with criminal causes; the Common Pleas, with litigation between subjects; and the Exchequer with business relating to the royal revenue. Since, however, the King’s Bench had a certain amount of civil jurisdiction in error, and since, by well known legal fictions, cases could be drawn from the Common Pleas to the King’s Bench and the Exchequer, the three courts in

<sup>43</sup> Before the present Public Record Office was opened in 1856 the public records were scattered in various depositories, notably the Tower, the Rolls Chapel and the Chapter House of Westminster Abbey, see Charles Gross, *Sources and Literature of English History* (2nd ed., London and New York, 1915), pp. 78-79.

<sup>44</sup> See Commons Journals, XIV, 334, and Lords Journals, XIV, 197, for his report on 14 Ed. III. c. 5, for redress on delays of justice.

<sup>45</sup> Hist. Mss. Comm. Rept. XII, pt. vi, p. 313, citing Commons Journals, XIV, 342. This faithful antiquary proved worthy of his hire; for, among his other extensive works, is a list of the records in the Tower drawn up by him and printed in the *Catalogus Manuscriptorum Angliae*, II, 183. See Dict. Nat. Biog., XLV, 132.

<sup>46</sup> At times when there was no Lord Chancellor, or Lord Keeper (an official of less exalted rank who performed practically the same functions) the custody of the Great Seal was in the hands of a body of commissioners.

practice exercised practically co-ordinate jurisdiction. Ordinarily until the nineteenth century the King's Bench and the Common Pleas had each a chief justice and three puisne justices, while the Exchequer had a chief baron and three puisne barons. For certain periods the number was larger and subsequently the number of puisne judges in each court was fixed at four.<sup>47</sup> The story of how the Court of Chancery attained its identity is long and complicated.<sup>48</sup> However, it assumed a definite and independent form by the fifteenth century.

From the inquiry of November-January 1689-90 it appears that there were in the King's Bench, in addition to the Judges, a Clerk of the Crown; a Secondary; a Clerk of the Rules; ten subordinate clerks in the Crown Office; a Marshal; a Deputy Marshal; an "innovated" office of Clerk of the Papers to the Marshal;<sup>49</sup> a Deputy Clerk of the Papers; two Custos (Custodes) Brevium, and their Clerks; an Under Clerk of the Inner Treasury to the King's Bench; an Under Clerk of the Outer Treasury of the King's Bench; a chief Prothonotary<sup>50</sup> and his Secondary; seven Clerks of the Custos Brevium for their several and respective counties; a number of Filazers,<sup>51</sup> one for each county apparently; a Clerk of the Bails and Posteads; a Clerk of the Declarations; a Clerk of the Doquets in the King's Bench office in the Inner Temple; a chief crier and porter;<sup>52</sup> a keeper of the sign for signing writs; and four tipstiffs. These

<sup>47</sup> See W. S. Holdsworth, *A History of English Law*, (3 vols., London, 1903-1909), I, esp. ch. III, and table of the officials of the Court of King's Bench, in 1740, 1815 and 1874 respectively. See also Report of the Commissions on the Courts of Common Law, esp. Rept. I, pp. 8ff.

<sup>48</sup> The best accounts are in J. F. Baldwin, *The King's Council* (Oxford, 1913) for the mediaeval period, and Holdsworth, I, ch. V, especially for the more modern period. The latter's table of Chancery officials is especially helpful.

<sup>49</sup> It is noted that no such office was in existence in 1630, when a "jury of attorneys \* \* \* were sworn \* \* \* to examine into new erected offices and exacted fees." Hist. Mss. Comm. Rept., II, pt. vi, p. 317.

<sup>50</sup> A chief clerk of court. For an account of the abuses connected with the office see North's Guilford, 127. "He was the proper officer of the Court to enter up the replications, rejoinders, rebutters, &c. (pronounced in law French) upon the record in Latin." There was one in the King's Bench, three in the Common Pleas. North quaintly describes why. "But then the Crown would needs have a peculiar prothonotary, who should take care of the King's profits and rights that arise in or come before the court; and then, who should deny him acting in all causes as the others did? These were so busy that they had no time for paupers, so another prothonotary crept in upon charity, that the paupers who could not pay fees might be dispatched. And now, of all these it is hard to know which is which. They have their secondary clerks and ride in coaches all alike; and, being a coordinate three, are no small nuisance to the searching business."

<sup>51</sup> Also spelt "philazer." An officer who filled out original writs, etc., and made out processes on them.

<sup>52</sup> This officer "states that he has no fees but what he receives from and by the hands of the Chief Prothonotary out of judgments and bails." Hist. Mss. Comm. Rept., XII, pt. vi, p. 318.

officials served or collected fees both on the crown and plea side of the King's Bench; but on the distinctively plea side there was a Seal Office with a Master and Sealer; a Lord Chief Justice's Clerk of the Errors; and a Keeper of the Seals of the Bills of Middlesex.<sup>53</sup> Thus, exclusive of the Judges and the Filazers for the various counties, there were some forty officials connected with the King's Bench alone.

While each had his separate fees, unhappily only those belonging to the Judges are recorded in papers printed in the Report of the Inquiry. They are as follows:

	£.	s.	d.
For every Dedimus Postestatum .....	0	6	0
For acknowledging a fine .....	0	6	8
For swearing an attorney at large .....	1	0	0
For acknowledgement of a deed to be enrolled .....	0	6	8
For swearing every witness upon Interrogatories .....	0	6	8
To that Judge who takes a private verdict on a trial at bar	0	6	8
For swearing a Clerk of the Office to the Chief Justice.	3	6	8
For acknowledgement of a Statute to the Chief Justice.	0	3	4 <sup>54</sup>

From a Parchment entitled: "A true account of the several rates of Lodgings and other Fees taken and exacted by the Marshal of the Marshalsea of the King's Bench in Southwark in 1677" we get a graphic picture of the abuses connected with jailers' fees. It states, "after giving particulars, relating to 53 chambers containing altogether 84 beds, that the yearly total of chamber rent in the House amounts to 1,274*l.*, the sheets come to 109*l.* 14*s.*, and the nurses to 124*l.* 6*s.*; besides which, the Marshal receives for the rent of the four cellars, empty without any stock of beer, 200*l.*; also 8*l.* out of every cellar for uttering tobacco, brandy, and bread and cheese, making 32*l.* a year; and the cook pays 20*l.* a year; making a total altogether of 1,760*l.* 10*s.* Then follows a table of fees. The Marshal is computed to receive from the 300 prisoners at large a yearly sum in weekly payments of 3,315*l.*; making his whole revenue as above amount to 5,075*l.* 10*s.*, not including action-money, bribery and gratuities. Note: Mr. Terry who pays 200*l.* rent for the four cellars, lays in a stock of beer and ale and lets it out as follows, viz.: He receives of the tapster for every barrel of beer drawn out 20*l.* 3*s.* 10*d.*, and for every barrel of ale 26*l.* 3*s.* 6*d.*, besides 8*l.* a year

<sup>53</sup> For the whole list see *ibid.*, pp. 317-321.

<sup>54</sup> *Ibid.*, 318-319. In Report I, of the Commission on the Courts of Common Law, 20 February, 1829, app. M., 687-777, may be found very full records, in tabulated form, of bills of costs for the various actions in the Common Law Courts at that date.

of each tapster for uttering tobacco, brandy, and bread and cheese, so that double gains thereby accrue to the Marshal and the farmer, besides the tapster reaps an advantage, which occasions ale to be sold for three-pence a short quart, or in tankards which hold not above a pint and a half, and beer the like measure for two-pence the pot. These extraordinary fees, with the entertainments every term due, with the other fees to the under-officers with gratuities at their pleasure for fear of their being debarred lawful privileges of the prison if they comply not, absolutely destroy the prisoners, and consume their estates, as for example the Petitioners against the aforesaid horrid exactions are daily not only abridged of their ancient rights as prisoners, but abused and put on the common side, to lodge in vaults fit for nothing but corpses by reason of the great damp and filth which has already destroyed many, and will destroy more, if not speedily prevented."<sup>55</sup> Nothing from DICKENS or CHARLES READE could be more graphic than this. It anticipates JAMES OGLETHORPE's famous parliamentary inquiry (1729) into prison conditions by forty years and by eighty-five, the celebrated reforms of JOHN HOWARD, providing among other things, for fixed salaries in place of jailers' fees.

In the Exchequer Court there were, besides the Chief Baron and the three puisne Barons; their Majesties' Remembrancer<sup>56</sup> and eight

<sup>55</sup> *Ibid.*, 328-329. A paper found enclosed in the preceding, entitled *Abuses of the House*, supplements the list of grievances as follows: "The Rule Money 4s. 4d. for men to pay the first and last days in the term for those only in action, formerly intended for those in execution. The turning to the Common Side, where Cooth and others have perished with their hard usage. The selling offices for money and laying a charge on the prisoners upon their first coming in, to make their places a profit to them, viz., the Deputy Marshals, the Steward, the Clerk of the Securities and Clerk of the Papers, Chamberlain and Sub-Chamberlain, and Gardener and Turnkeys, who have Patents for their offices. Mrs. Mann abused by Mr. Moore, Turnkey, who obstructed her for bringing in provisions to the prisoners. Sheltering in these Rules who are protected by the Marshal against the laws, by paying money unto him." Cf. with this an entry in the Committee Book for 9 November, 1689: "One grievance in the Court of King's Bench is that the Keeper of the King's Bench Prison makes oath the first day of every term that all his prisoners are within the Rules of that Court, though at the same time some of them are out of the Kingdom." *Ibid.*, 329.

<sup>56</sup> In this office and that of the Treasurer's Remembrancer "they prepared the business which was to come before the Barons of the Exchequer, and called the attention of the latter to important matters concerning the revenue." Their rolls contain such matters as the recovery of debts due to the Crown: the Treasurer's Remembrancer, for example, "had charge of the originalia rolls in which are entered the estreats (certified abstracts of judicial records) transmitted from the Chancery to the Exchequer in order to inform the latter regarding transactions which affected the revenue in any way." Gross, *Sources and Literature*, 435. Their duties are set forth in more detail in Hubert Hall, *Red Book of the Exchequer*, 863-887. There is a memorandum (Hist. Mss. Comm. Rept., XII, pt. vi, 321), "That in 14 Car. I, in pursuance of His Majesty's order, signed by his Principal Secretary of State, a jury of fifteen of the ancientest clerks, sworn in open court, presented a list of the fees taken then, and for the last thirty years by

clerks in his office; a Clerk of the Pipe<sup>57</sup> and Deputy, together with two Secondaries and six Clerks in their office; Clerks of Leases,<sup>58</sup> Office of Pleas of the Exchequer,<sup>59</sup> apparently a clerk and four attorneys; a Foreign Apposer;<sup>60</sup> a Clerk of the Extracts; four Auditors who divided among them the various counties; their Majesties' Remembrancer of First Fruits<sup>61</sup> and two clerks; a Marshal;<sup>62</sup> a Chief Usher and four Ushers; a Court Keeper; a Clerk of Errors in the Exchequer Chamber in Westminster; Chamberlain's Deputies, number not given;<sup>63</sup> Lord Treasurer's Remembrancer,<sup>64</sup> Secondary and various attorneys, and a Comptroller of the Pipe.<sup>65</sup> Altogether, in the Exchequer, there were at least from forty to fifty officials, for apparently some of the lesser ones are not enumerated in the testimony before the Committee.

In the Court of Common Pleas, in addition to the Chief Justice and the three puisne Justices, there were: a Custos Brevium, three Prothonotaries,<sup>66</sup> Filazers for the various counties; Exigenters;<sup>67</sup>

the Remembrancer." Most of the officials in the various courts seem to have been similarly regulated at various times.

<sup>57</sup> There was a Pipe Office where the records of revenues from the King's farm, the King's gold and judicial fines were kept in rolls till 1832. They were called Pipe Rolls because the membranes were rolled in the form of pipes. Gross, 421.

<sup>58</sup> Number not given.

<sup>59</sup> The fees of their writs, entries and other proceedings had been reported, 21 Jas. I.

<sup>60</sup> He examined the sheriff's accounts. The office became a sinecure, like so many others, and was abolished in 1833.

<sup>61</sup> It is noted that the fees for compounding First Fruits were formerly 18s. 10d., but at the time of the Inquiry of 1689 were £1 6s. 6d. Hist. Mss. Comm. Rept., XII, pt. vi, 323. These first fruits, or first year's income from an ecclesiastical benefice, were first paid to the Pope in 1259, they were annexed by the Crown by Henry VIII. Under the name Queen Anne's Bounty they were devoted to augmenting the incomes of poorer clergy in 1703-1704.

<sup>62</sup> It is noted that the Marshal "is a patent officer without salary, and many of the fees void by the taking away of the Court of Wards (in 1660). The profits of this office are but small considering the constant attendance by himself and Deputy, on the Treasurer, Chancellor, and Barons of the Court." They were estimated at £40 a year. Hist. Mss. Comm. Rept., XII, pt. vi, 322.

<sup>63</sup> Ibid., 322.

<sup>64</sup> Cf. n. 56. A memorandum states: "That a great part of the business upon which several of the fees were formerly received is ceased upon the taking away of the Court of Wards, and the writing of press of extent for all fines, recognizances and other debts of the Crown, and drawing down on record all debts levied by the sheriffs and other business done ex officio for which there is no fee, salary or reward either to Master or Clerks, is much more than the business for which the aforesaid fees are allowed and taken." Ibid., 322.

<sup>65</sup> Ibid., 321-323.

<sup>66</sup> They got fees for entries of declarations, pleas, and judgments, making and entering writs, informations, &c.

<sup>67</sup> They made out exigents, or writs preliminary to outlawry. It is stated "that the whole profits of the exigenters anciently consisted of the fees in three writs only, viz.: On the Exigent, and more according to the length, 11d.; on the Proclamation, and more according to the length, 6d., and on the Supersedeas 2s., which fees were paid till 14 James II, who by Letters Patent about that year granted the sale making of the Super-



Chirographers<sup>68</sup> of fines; a Proclamator and Marshal; a Clerk of the Inrollment of Fines and Recoveries; a Clerk of the Inrollment of Warrants and Estreats; a Clerk of the Utlary (outlawry) Office; a Clerk of the Juries; a Clerk of the Essoynes (legal delays) and his Clerk; an Office of Supersedeas to the Exigent;<sup>69</sup> a Porter of the Court; a Court Keeper; a Clerk of the King's Silver,<sup>70</sup> a Clerk of the Fleet<sup>71</sup> and Tipstuffs. The total number of offices in this court exclusive of Filazers and others not enumerated amounted to nearly thirty.<sup>72</sup>

There is a table of the fees of the Warden of the Fleet prison which is worth reproducing.<sup>73</sup> It is described as the "Table of the Ancient Fines, Commons, and Fees, as they were renewed and established in the reign of Queen Elizabeth, and renewed and confirmed in the 19th year of Charles II by Letters Patent under the Great Seal," and was hung in the Hall in the Fleet.

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seadeas quia improvide to John Murray, Esq., then one of his Majesty's Bedchamber. The then exigenters, after long suit and much opposition, submitted to the grant, thus losing the benefit of the writ which was the least in labour and more in profit than both the others, whereupon the then Chief Justice \* \* \* and the other judges of the Court, by warrant under the Privy Seal, allowed the exigenters to take a penny more on the exigent, since which there has been no farther increase of fees nor any other alteration, save only that their offices are decayed three parts in four at least in their yearly value."

<sup>68</sup> Chirographs were indentures, each party getting a portion.

<sup>69</sup> For signing every writ 1s. 6d. For making every ordinary writ they got 6d. and if a writ exceeded six lines then for every four lines so exceeding, 4d. *Ibid.*, 324.

<sup>70</sup> This was a clerk charged with certain fines, known as the King's Silver, and their payment. This King's Silver is not to be confused with the Common Law right of the Sovereign to all gold and silver found in mines of baser metal (v., e. g., Amos, English Constitution, 233). There are two lists of the fees taken by the Clerk of the King's Silver, *Hist. Mss. Comm. Report*, XII, pt. vi, 324, 326. The first appears to be the more complete. It is as follows:

	s.	d.
For the fees of every ordinary fine taken by the L. Chief Justice or any Judge of Assize in the Western Circuit .....	1	6
For every ordinary fine taken as aforesaid in any other county .....	0	10
For every fine taken by Special Commission above the former rates .....	0	4
For every several caption in any fine where it is taken at several times by Special Commission above the former rates .....	0	4
For every fine certified by a Certiorari after the death of any Judge or other Commissioner, over and above the former rates .....	0	6
For the post diem of every fine brought in the vacation after the return of the writ of covenant .....	0	6
For every search of every fine for any term .....	0	4
For every copy of the entry of the King's Silver .....	0	8
For every fee of a ne recipiator of any fine either by order of Court or of any Judge .....	3	4
For continuing of any such order from term to term till it be dissolved .....	3	4
For every fine not brought in before the Essoin day of the subsequent term and for every term after .....	3	4

<sup>71</sup> The Fleet Prison was used chiefly for debtors.

<sup>72</sup> *Hist. Mss. Comm. Rept.*, XII, pt. vi, 323-327.

<sup>73</sup> *Ibid.*, 324-325. This table appears on page 545.

	£.	s.	d.	£.	s.	d.	£.	s.	d.	£.	s.	d.	£.	s.	d.	£.	s.	d.
The Warden's fine for liberty of House and Irons at the first coming .....	10	0	0	7	0	0	5	0	0	2	13	4	1	6	8	0	13	4
The first week's Commons for himself .....	5	0	0	3	6	8	2	0	0	1	6	8	0	16	4	0	6	10
The Dismission .....	3	5	0	2	10	0	1	13	4	0	12	0	0	7	4	0	7	4
The ordinary Commons weekly with wine ....	3	6	8	2	0	0	1	13	4	0	18	6	0	10	0	0	5	0
The Clerk's fee for making the obligation .....	0	10	0	0	7	0	0	5	0	0	2	4	0	2	4	0	2	4
The fee for entering the name and cause .....	0	5	0	0	3	0	0	2	6	0	0	4	0	0	4	0	0	4
The porter's fee .....	0	10	0	0	7	0	0	5	0	0	1	0	0	1	0	0	1	0
The jailor's fee .....	0	10	0	0	7	0	0	5	0	0	1	0	0	1	0	0	1	0
The Chamberlain's fee .....	0	10	0	0	7	0	0	5	0	0	1	0	0	1	0	0	1	0
For wine .....	1	0	0	0	13	4	0	10	0	One gallon	One gallon	A pottle	nil.	nil.	nil.	nil.	nil.	nil.
										of wine	of wine	of wine						

According to an appended note: "The Warden takes also by virtue of the said Letters Patents of every prisoner he may lawfully let go abroad with a keeper, for the half-day, ten pence; and for the whole day, twenty pence; and also of every Parlour Commoner at the first coming 2s., and afterwards four-pence per week, and of every Hall Commoner 1s. at first, and afterwards two-pence per week for maintenance of a parson." Truly the debtor without rich friends or relatives found the Fleet prison a bottomless pit.

The officials in Chancery, beside the Lord Chancellor and the Master of the Rolls, were: twelve Masters in Chancery and their clerks; the Register<sup>74</sup> and four Deputies; the Register of Affidavits; the Six Clerks<sup>75</sup> with sixty under clerks; three Clerks of the Petty Bag;<sup>76</sup> two Examiners;<sup>77</sup> and twenty-four Cursitors.<sup>78</sup> One of the many troubles with Chancery was that it did not have enough judges and was overburdened with sinecures and superfluous clerks all enjoying fees.<sup>79</sup> As early as 1382, it was said of the Masters that they were "over fatt in bodie and purse and over well furred in their benefices, and put the King to very great cost more than needed,"<sup>80</sup> and the same might be said of most of the clerks subsequently added. The Chancellors could not deal with the increasing volume of business and they turned it over to the Masters and the Six Clerks who left the performance of their duties to underlings who paid for their places and recouped themselves by various sharp practices.<sup>81</sup> "A particular of grievances" which one Percival Brunsell<sup>82</sup> "dis-

<sup>74</sup> He made out various original writs. See F. W. Maitland, *Collected Papers* (3 vols. Cambridge, 1911) II, 110-173, for a "History of the Original Writs." This paper appeared originally in the *Harvard Law Review*, 1889, III, 97-115, and is also reprinted in the *Select Essays in Anglo-American Legal History*, II, 549-596.

<sup>75</sup> "Their sole duties were to file and preserve the records, to certify the court concerning them, and to sign copies." Holdsworth, *English Law*, I, 229.

<sup>76</sup> They had the drawing up of parliamentary writs of scire facias and *congés d'élire*, or notifications to elect a bishop to fill a vacancy.

<sup>77</sup> They examined on oath parties to suits.

<sup>78</sup> They made out original writs for the different counties.

<sup>79</sup> See *Hist. Mss. Comm. Report*, XII, pt. vi, 327-328, Holdsworth, I, 318, 335, 447-450.

<sup>80</sup> Cited by Holdsworth, I, 218.

<sup>81</sup> In addition to the instances already cited Roger North in his *Guilford*, 127, gives a peculiarly vivid picture at the close of the Restoration period: "So it appears at this day in the Chancery that the offices are multiplied. First, the six did all the work that originally might be done by a single secretary, and then their clerks that rose to ten apiece, mere copiers under them, have got to be officers and thirty more added to them. And still all of them have clerks, who may hope in time to be officers too and beard their masters, as they do the six clerks. The cursitors made out processes de cursu. Special writs are magistralia. The masters in Chancery are twelve. The cursitors are by counties."

<sup>82</sup> From a presentation of his case made 19 November, 1689, it appears that he was once a clerk in the Rolls Chapel, and was made by Charles II a Commissioner in the Alienations Office and Office of the Surveyor of the Greenwax fines, "with a promise

covered to CHARLES II, not yet redressed," and which was presented to the Committee of Inquiry, 19 November 1689, furnishes such a lively and detailed picture of existing abuses that it deserves to be quoted in full. It is as follows:

"*1stly*. That no one can practice the law in other's names without incurring the penalties of the Statute 3 JAC. I, c. 7, and whoever practices in his own name is obliged by oath and the Statute of ELIZABETH to defend all just rights and privileges of the Imperial dignity, also by a more particular oath to do no wrong nor suffer any to be done without discovering the same to the King or his Ministers. *2ndly*. The Statute 12 RICH. prohibits all offices of trust to be sold or disposed of by Brokerage, favour, or affection; yet most great Ministers place their relations therein or others for money. *3rdly*. The Judges are prohibited by oaths and the Statute of 18 EDW. III, Stat. 4, to take Fee, Robe, or Gift of any but the King, yet they take great sums of officers upon sale and administration and New Year's Gifts; robes of the City of London, and fees of private persons in suits; which increase or decrease as proceedings abate or multiply; and they and great Ministers evade the said statutes for want of a law to make officers upon admission discover whether they have promised or given anything for offices. *4thly*. The Judges are sworn by the Statute 1 ELIZ. 4, to defend all just rights belonging to the Imperial dignity and as the King is entrusted with the administration of justice, every office incident thereto is in the King's gift, and not anything can issue of the Crown without express mention by the Statute 1 HEN. IV, c. 4; and at Common Law not any can transfer greater estates in land or offices than they have therein. Yet the judges whose estates in offices terminate with them, do in their own right, convey freeholds to others to the prejudice of the King and people, the value of such offices amounting to more than 100,000*l*. *5thly*. Officers levy charges amounting in the King's Bench to 10*l*., and in the Common Pleas to

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for further reward for his discovery, which had lost him a practice of over £300 a year; that his salary had been stopped by James II, and that he had petitioned the present King (William III) to be restored to his office." In a petition which he presented 16 January, 1689-90, he stated that he had "expended or contracted debts of upwards of 4,000*l*. by the discovery of undue practices in the Courts of Justice, which his oath and duty obliged him to, and also lost his practice, which was worth more than 300*l*. a year, by angering the then judges and officers, and has never had anything in consideration thereof but two small offices, which Charles II granted to him, and which were taken from him in the late ill times, and which his present Majesty more than once graciously promised to restore. \* \* \* The said offices have been granted to others, and Petitioner and his family are ready to starve for want of subsistence." Although he alleged that the Lord Chief Baron and the other Barons of the Exchequer had reported favorably on his experience and qualifications, nothing was done on his petition that some provision might be made for him. Hist. Mss. Comm. Rept., XII, pt. vi, 331.

3,024*l.* under pretense of recovering a duty to the King of 6*s.* 8*d.* called a *Capias*, and fine, but seldom or never account or pay any in the Common Pleas to the King. 6*thly.* Officer(s) for bribes pack juries, by sparing many of the principal panel, and supplying it with by-standers attending to serve base ends. 7*thly.* Malicious informations are set on foot, and informers escape unpunished by officers' non-observance of the Statute 18 ELIZ., c. 5. 8*thly.* Officers, by falsifying their oaths, wrong the King of many fines upon original process in actions of debt, and oppress peaceable subjects by not imposing and levying fines and amerciaments for the King upon such as by undue returns or unreasonable demands disturb others, to multiply proceedings and continuance of fees, whereby many actions are unduly delayed, especially in Chancery, where causes have pended upwards of twenty years. 9*thly.* Officers for bribes smother presentments, &c., against notorious criminals, or discharge them upon false suggestions with easy compositions to the King \* \* \*. 10*thly.* The King has a duty on alienations being 10*l.* in all cases for every 100*l.* contained in writs of covenant and entry. The Commissioners, instead of dealing impartially, take the full from some and only part from others."<sup>83</sup>

In view of the information collected, by the Lords' Committee for Privileges, concerning superfluous offices, fees, and irregularities in the Law Courts several steps were taken. On 31 December it was moved in the Committee "that four Lords may be commissioned to regulate the Courts in Westminster," but the debate was adjourned. However, a bill offered by the Earl of MACCLESFIELD "for regulating the law" was read. Again, 17 January, 1689-90 another bill "for regulating the Courts of Justice" was read. It was also proposed "that the lawyers that plead at the Bar of the House of Lords take no more than [left blank] for their fees." On the same day the Earl of BRIDGEWATER took the two bills to consider until the new meeting of the Committee. On motion, the Committee was reappointed, 22 March.<sup>84</sup> On 4 April, 1690, an amended draft of an "Act for the benefit of the subject regulating the execution of the Law" passed the first reading in the House of Lords and was referred to a Select Committee.<sup>85</sup> It aimed to enforce old laws, and to frame new provisions against abuses in the administration of the law. Among other things, it imposed oaths on the judges to observe the Statutes against buying and selling offices; it sought "to prevent partiality" of judges, to check the practice of counsel at law making

<sup>83</sup> Ibid., 330-331.

<sup>84</sup> Ibid., 315, citing, *inter al.*, Lords Journals, XIV, 435.

<sup>85</sup> For the text of the bill which well repays careful reading, see Hist. Mss. Comm. Rept., XIII, pt. v, 17-25.

presents and gifts to judges, or of taking fees of their clients and then neglecting to attend or plead their causes; "to avoid vexation and extortion" from excessive fees, it provides that tables of fees shall be hung "in every Court, office or place where fees are payable." Enactments were directed against "Bills in Chancery or the Exchequer filled with impertinent matter to increase the charge of defendants who are to pay for copies of them," against the taking of "any fee or other profit or reward from persons admitted to sue *in forma pauperis*," against requiring special bail, and against attorneys "who in favour of their clients may embezzle, raise or deface their adversary's evidences." Further safeguards were provided against the practice of the Marshal of the King's Bench and the Warden of the Fleet of allowing "persons charged in execution for debt and damages or both \* \* \* to go abroad at their pleasure," and preventing the serving of legal processes in "privileged places in and about London and Westminster and Southwark." Attaint of juries for false verdicts was extended to criminal causes, but the over-severe penalties were mitigated. Provision was made for the more effectual redress in Parliament of delays of judgment in the other Courts. The bill concludes as follows: "And whereas many good laws made in former reigns, viz.: 51 HEN. III, St. 5; 3 EDW. I, cs. 18, 19; 6 ED. I, c. 14; 10 ED. I, Stat. Rutl; 27 ED. I, c. 2; 6 HEN. IV, c. 3; 7 HEN. IV, c. 3; 33 HEN. VIII, c. 9; 27 HEN. VIII, cs. 10, 24; 7 ED. VI, c. 1; 18 ELIZ., c. 5; 22 and 23 CAR. II, c. 22, avail not to suppress the corruptions and undue practices thereby intended to be remedied because officers and attorneys, enriching themselves by non-execution or mis-execution of the laws, and conniving at others' disobedience, have of late years escaped unpunished, to the great scandal of the Government, for prevention whereof, and that fines, pains or penalties wilfully incurred may not for the future be withdrawn and concealed, and that pains and penalties incurred by inadvertancy and not out of any ill design may be compounded and discharged with mercy and moderation, be it enacted, That the Lord Chancellor, Keeper of Commissioners of Great Seal, Treasurer or Lords' Commissioners of the Treasury for the time being, Under Treasurer, Judges and Barons shall make necessary rules and orders or other provisions in the respective courts and places, as much as in them lies, to prevent all undue practices in officers and attorneys; and that the person or persons refusing to make such rules, orders and provisions, and the officer or attorney or other disobeying them shall for every offense incur not only the penalties of the laws already in force against all such their undue practices, but shall further incur the penalty of *five*

*hundred pounds*, whereof one moiety shall be to the use of the King and Queen, and the other to the informer \* \* \*." Unhappily this measure did not pass, and little was done for the improvement of the law until the eve of the Reform Bill and those years so fruitful in progress which followed.<sup>86</sup>

The long persistence of this "strangling embroglio of coiled non-sense" would strongly incline us to include judges in SHAKESPEARE'S reflection on lawyers: "Time stands still with them, who sleep from term to term, and thus perceive not how time moves." HOLDSWORTH has a convincing explanation for their sustained lethargy: "The legal system of the country," he says, "had gradually grown up. It had been gradually adapted to the exigencies of an advancing civilization by a series of small changes and legal fictions. Cumber-some forms, an expensive procedure, abuses in which many had a vested interest, were the result. No reasonable man who looked at the existing condition of things could defend it. It was only a special training which could enable anyone to understand it. Those who had endured the labor necessary to understand it were the only persons likely to undertake such a reform. They could explain the apparent anomalies, and it is a common fallacy to confuse explanation and justification. Any measure of reform would render useless knowledge which it was painful to acquire and profitable to apply."<sup>87</sup> It required the vigorous breath of an awakened, emancipated public opinion to blow away the accumulated dust of ages,<sup>88</sup> but that was not enough. As HOLDSWORTH warns us: "The training required for an adequate working knowledge of the law is great, and the reformation or restatement of the law requires a knowledge still more thorough."<sup>89</sup> Impelled by the popular demand, specialists who knew their business set to work and gradually produced a system which, in spite of its remaining imperfections, is acknowledged to be the best in existence—superior to our own.

This fragmentary study on the state of the courts at the close of the Revolution of 1688 shows only one corner of the lumbered garret they had to clear away, though it helps to demonstrate the difficulties of the task. There was danger of throwing away valuable fur-

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<sup>86</sup> Among the earliest notable moves in the modern direction are the recommendations to be found in the Reports of the Commission on the Common Law Courts, I-VI, 1829-1834, and the Reports of the Commission on the Criminal Law, I-VIII, 1834-1845. For a brief account of the reforms see Holdsworth, *English Law*, I, 110-112; 231-235.

<sup>87</sup> *English Law*, I, 222.

<sup>88</sup> See on the subject A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in the Nineteenth Century in England* (London, 1905, 2nd ed. 1914), a very stimulating work though it is devoted largely to legislation. For judicial legislation, see 361ff., 2nd ed.

<sup>89</sup> *English Law*, I, 223.

niture with the rubbish.<sup>90</sup> The example should be a guiding one for us. The insistence of public opinion may be the goad; yet it is not by elective judges, by the recall of judges or of judicial decisions, or by well-meant, amateurish legislation, that sound betterment can be achieved, but by responsible legal specialists of high ideals, grounded on thorough knowledge, not only of what the law is, but how it grew in its environment.<sup>91</sup>

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<sup>90</sup> Blackstone in discussing the ill effects of "logical distinctions" and "metaphysical subtleties" which he attributes to Norman jurisprudence, puts the problem tersely, though it relates to only one phase of the subject: "And to say the truth, these scholastic reformers have transmitted their dialect and finesses to posterity so interwoven in the body of our legal polity that they cannot be taken out without a manifest injury to the substance." 1 Commentaries, 418.

<sup>91</sup> Sir Walter Scott, himself a member of the bar, says in *Guy Mannering*: "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."